IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Bryan Ardoin	§	
Plaintiff,	§	
	§	
v.	§	
	§	CIVIL ACTION NO. 4:19-cv-02234
Juan Obregon, et al,	§	
Defendant.	§	
	§	

DEFENDANTS CITY OF PORT LAVACA'S AND JUAN OBREGON'S PARTIAL MOTION TO DISMISS

Defendants City of Port Lavaca, Texas, and Juan Obregon move the Court, under FED. R. CIV. P. 12(b)(6), to dismiss the following of Plaintiff's claims.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Authorities

NATURE AND STAGE OF THE PROCEEDING

1. Plaintiff's allegations fail to state a plausible claim for relief under 42 U.S.C. § 1985, under 42 U.S.C. § 1985, under 42 U.S.C. § 1983 for alleged malicious prosecution, under Texas law, or against the City of Port Lavaca, Texas. Therefore, the City and Officer Obregon move the Court, under Fed. R. Civ. P. 12(b)(6), to dismiss these claims.

THE PLEADING STANDARDS REQUIRE PLAINTIFF TO ALLEGE FACTS THAT STATE A PLAUSIBLE CLAIM FOR RELIEF

2. The federal pleading requirements are real and the threshold for stating a claim requires **factual allegations regarding each material element necessary to sustain recovery under an actionable legal theory**. *Peña v. City of Rio Grande City*, 879 F.3d 613, 621 (5th Cir. 2018). To state a claim for relief, a complaint must identify **factual and legal grounds** which could entitle a plaintiff to relief against each defendant sued. *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). Merely listing generalized legal standards, without providing substantive factual matter supporting them, simply does not state a claim. *See Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 387 (5th Cir. 2001).

3. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007));

accord *McLin v. Ard*, 866 F.3d 682, 688 (5th Cir. 2017). In evaluating the sufficiency of a complaint, courts must **first distinguish** pleading **allegations** within a complaint which contain **factual content** from **mere assertions** that do not. To accomplish this, the Supreme Court has instructed courts to, "begin [the] analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth." *Iqbal*, 129 S. Ct. at 1951 (emphasis added). "[T]he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Id.* at 1954.

> Determining whether a complaint states a plausible claim for relief will, [], be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not "shown" – "that the pleader is entitled to relief."

Id. at 1950 (emphasis added) (internal citation omitted).

4. "A claim has facial **plausibility** when the plaintiff **pleads factual content** that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Gonzalez v. Kay*, 577 F.3d 600, 603, (5th Cir. 2009) (emphasis added). "Where a complaint pleads facts that are 'merely consistent with a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (brackets omitted) (quoting *Twombly*, 550 U.S. at 557). Allegations in a complaint must "raise a right to relief above the speculative level." *Cuvillier*, 503 F.3d at 401. The Court should not

"strain to find inferences favorable to the plaintiffs" or "accept conclusory allegations, unwarranted deductions, or legal conclusions." *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005) (quoting *Southland Sec. Corp. v. Inspire Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004)).

ALLEGATIONS DO NOT SHOW THE CITY VIOLATED FEDERAL LAW

5. Plaintiff alleges that Port Lavaca police officer Juan Obregon and two other officers encountered Plaintiff asleep in a parked car and the officers observed Plaintiff perform field sobriety tests, arrested Plaintiff, searched and towed Plaintiff's vehicle, and charged Plaintiff with the offense of public intoxication. Plaintiff alleges he was not intoxicated. {Doc. No. 1, ¶¶ 17-35}. Plaintiff alleges he bumped his head when placed inside the police vehicle {Doc. No. 32}, and the handcuffs were uncomfortable on his wrists {Doc. No. 32, 37}.

ARGUMENT AND AUTHORITIES

I. Plaintiff failed to allege facts that state a claim under 42 *U.S.C.* § 1985.

6. In ¶15 of his complaint, Plaintiff identified 42 *U.S.C.* §§ 1985 and 1986, as a source of his claims but Plaintiff failed to otherwise mention, or allege any fact which implicates, a claim under § 1985 or § 1986. In ¶"To [state] a claim under 42 *U.S.C.* § 1985(3), a plaintiff must [allege facts which show]: (1) a conspiracy involving two or more persons; (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or

property, or a deprivation of any right or privilege of a citizen of the United States." *Hilliard v. Ferguson*, 30 F.3d 649, 652-53 (5th Cir.1994). "In doing so, the plaintiff must show that the conspiracy was motivated by a class-based animus. *Id* at 653. "The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based invidious discriminatory animus behind the conspirator's action." *Griffin v. Breckinridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 1798 (1971). Additionally, in light of the intercorporate conspiracy doctrine, the City and its employees, including Officer Obregon, constitute a single entity that cannot, as a matter of law, conspire with itself. *Compare, Hilliard*, 30 F.3d at 653; *Swilley v. City of Houston*, 457 Fed. Appx. 400, 404 (5th Cir. 2012); and *Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998).

7. Plaintiff failed to allege facts which implicate any element of a claim, much less each element of a claim necessary to state a claim for relief, and all of the participants in the arrest and search were City employees so the intercorporate conspiracy doctrine bars conspiracy claims. The pleading requirements of the Federal Rules of Civil Procedure are real and the threshold for stating a claim for relief requires factual allegations regarding *each material element necessary to sustain recovery* under an actionable legal theory. *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989). Plaintiff failed to do so; therefore, he

failed to allege facts which state a claim under 42 *U.S.C.* § 1985.

II. Plaintiff failed to allege facts that state a claim under 42 *U.S.C.* § 1986.

8. As a matter of law, Plaintiff's failure to allege facts which support a claim under 42 *U.S.C.* § 1985 mandates dismissal of any claim asserted under 42 *U.S.C.* § 1986. *Dowsey v. Wilkins*, 467 F.2d 1022, 1026 (5th Cir. 1972).

III. Alleged malicious prosecution is not a violation of the Constitution or laws of the United States.

9. "'Malicious prosecution' standing alone is no violation of the United States Constitution." *Flores v. City of Palacios*, 381 F.3d 391, 404 (5th Cir. 2004) (quoting *Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir. 2003) (en banc)). An allegation of malicious prosecution does state a claim for relief under federal law merely because the defendant is a police officer. *Compare*, *Albright v. Oliver*, 510 U.S. 266, 268, 114 S. Ct. 807 (1994); with *Baker v. McCollan*, 443 U.S. 137, 146, 99 S. Ct. 2689, 2696 (1979). A claim based upon conduct that might constitute malicious prosecution at common law, like Plaintiff asserts here, is not cognizable under federal law. *See Deville v. Mercantel*, 567 F.3d 156, 169-170 (5th Cir. 2009). Plaintiff's complaint reveals he seeks to support a claim of alleged malicious prosecution through federal law based upon the elements of a malicious prosecution claim under Texas law {Doc. No. 1, ¶ 62}, and the Fifth Circuit court expressly rejected such claims. *Castellano*, 352 F.3d at 947-55. Therefore, the Court should dismiss Plaintiff's claims of alleged malicious prosecution asserted

under § 1983.

IV. Plaintiff failed to allege facts which show any City policy caused a violation of Plaintiff's rights.

10. Plaintiff failed to state a claim against the City because Plaintiff has not alleged facts which show that an unconstitutional City policy *caused* an officer to violate Plaintiff's rights. To avoid dismissal for failure to state a claim against the City, "[Plaintiff's] description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory; it must contain specific facts." *Spiller v. City of Texas City*, 130 F.3d 162, 167 (5th Cir. 1997). The Court is "not bound to accept as true legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944 (1986). "[U]nder § 1983, local governments are responsible only for '*their own* illegal acts.'" *Connick v. Thompson*, 560 U.S. 51, 60, 131 S. Ct. 1350, 1359 (2011). A city is not vicariously liable for its employees' actions, *even if they are unconstitutional*. *Id*. Plaintiff's bare legal conclusions that officers "unlawfully" did this and that, without any **factual** allegation that actually shows unlawful conduct cannot support a claim for relief against the City. See *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38 (1978); *Snyder v. Trepagnier*, 142 F.3d 791, 795 (5th Cir.1998). To state a plausible claim against either City, Plaintiff must allege *facts* which show: (1) an unconstitutional City policy that actually existed; (2) an actual acceptance of the

unconstitutional policy by the City's policymaker; and (3) that Plaintiff was subjected to constitutional deprivation *because of* the execution of the particular governmental policy identified. *Id*.; *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir.) (en banc), *cert. denied*, 472 U.S. 1016 (1985). "[Governmental] liability must be predicated upon a showing of 'fault,' not merely 'responsibility.'" *Id*.

11. "A plaintiff seeking to establish [governmental] liability on the theory that a facially lawful [governmental] action has led an employee to violate a plaintiff's rights must demonstrate that the [governmental] action was taken with 'deliberate indifference' as to its known or obvious consequences." *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 407, 117 S. Ct. 1382, 1390 (1997). "[Governmental] liability must be predicated upon a showing of 'fault,' not merely 'responsibility.'" *Id*. "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a [governmental] actor disregarded a known or obvious consequence of his action." *Brown*, 520 U.S. at 410, 117 S. Ct. at 1391.

12. To establish a claim, the Plaintiff must allege facts which show not only an unconstitutional decision, but *a decision by the City to violate the Constitution*. *See Gonzalez*, 996 F.2d at 759. The Constitution provides protections from a governmental agency *causing a constitutional deprivation* but it does not, and could not, effectively require a governmental entity to enact a transcendent policy

that prevents law enforcement officers from using excessive force. *See Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005); *Pineda v. City of Houston*, 291 F.3d 325, 333 (5th Cir. 2002). Plaintiff's bare legal conclusions do not satisfy these requirements so his complaint fails to state a claim against the City.

A. No factual allegation plausibly shows an unconstitutional City policy.

1. Plaintiff's conclusory legal assertions the City *had a duty to do everything but didn't* are nullities not entitled to assumption of the truth.

13. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557). Plaintiff's, factually unsupported, repetitious conclusory legal assertions that the City had a duty to do … and didn't is useless noise that cannot support a claim to relief against the City. *Iqbal*, 556 U.S. at 679, 129 S. Ct. at 1949

2. No factual allegation plausibly shows a governmental policy.

14. To avoid dismissal for failure to state a claim, "[t]he [Plaintiff's] description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory; **it must contain specific facts**." *Spiller v. City of Texas City*, 130 F.3d 162, 167 (5th Cir.1997) (emphasis added). The Court is "not

bound to accept as true a [Plaintiff's] legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944 (1986). The City is entitled to insist that Plaintiff identify a specific unconstitutional policy for which the City's policymaker could be held liable, *Piotrowski v. City of Houston*, 237 F.3d 567, 578-581 (5th Cir. 2001).

15. Plaintiff's assertions reveal he seeks to impose liability on the City based on one isolated instance of alleged unconstitutional conduct by police officers, Plaintiff's own arrest, not a City policy that could conceivably support liability against the City. *See City of Oklahoma v. Tuttle*, 471 U.S. 808, 824, 105 S. Ct. 2427, 2436 (1985); *Compare Whatley v. Montgomery Cty.*, No. H-13-3735, 2014 U.S. Dist. LEXIS 76472, at *9 (S.D. Tex. June 5, 2014) (plaintiff's allegations focusing only on their own single experience with a police department and plaintiff failing to allege their arrest would have placed the police department on notice that the existing practices were so clearly inadequate that they were likely to result in constitutional violations); *Cullingford v. City of Houston*, No. H-11-523, 2012 U.S. Dist. LEXIS 37336, at *12 (S.D. Tex. Mar. 20, 2012) (five incidents of misconduct insufficient to meet rigorous standards of culpability and causation required to ensure a municipality is not held liable soley for the actions of its employees); *Robles*, 2016 U.S. Dist. LEXIS 177940 at *8 (two instances of unconstitutional conduct insufficient to meet the standard set in *Webster*, 735 F.2d at 841. A City

policy cannot be inferred from the allegations of an isolated alleged constitutional deprivation Plaintiff claims. *See Webster v. City of Houston*, 735 F.2d 838, 851 (5th Cir. 1984) (en banc).

16. "Isolated violations are not the **persistent, often repeated, constant violations**, that constitute custom and policy as required for municipal § 1983 liability." *Bennett*, 728 F.2d at 768 n. 3 (emphasis added). The Fifth Circuit Court has discussed that it is "nearly impossible" for a plaintiff to establish a city's deliberate indifference on the basis of any single incident, *Gabriel v. City of Plano*, 202 F.3d 741, 745 (5th Cir. 2002), and Plaintiff has not identified any facts which could support the nigh impossible. *See Piotrowski*, 237 F.3d at 579-580.

3. No factual allegation plausibly shows the City's policymaker could be held responsible for any deprivation Plaintiff claims.

17. Plaintiff has also failed to allege facts which show that the City's policymaker was deliberately indifferent to Plaintiff's rights. *See Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 407, 117 S. Ct. 1382, 1390 (1997). Plaintiff's claims against the City are insupportable under this element for two separate reasons. First, there is no factual allegation which shows that the City's policymaker established or approved of an unconstitutional City policy. Second, there is no factual allegation which shows that the City's policymaker was aware of any alleged unconstitutional policy and, nonetheless,

deliberately chose to maintain the unconstitutional City policy. Plaintiff's complaint consists solely of bare conclusory legal assertions, no factual allegations which show an unconstitutional City policy that its policymaker could be held responsible for enforcing.

4. No factual allegation plausibly shows the City's policymaker was deliberately indifferent to the need for a constitutionally adequate officer training program.

18. The Supreme Court has specifically held that "[a government's] culpability for a deprivation of rights is **at its most tenuous** where (as here) a claim turns on a **failure to train**." *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005). (emphasis added). Only when a failure to train an officer actually causes an injury, may it, in *certain very limited circumstances*, fairly be said to represent a policy for which a governmental entity may be held responsible. *Canton v. Harris*, 489 U.S. 378, 390, 109 S. Ct. 1197, 1205 (1989). The basis for liability against a city under such circumstances is dependent upon the degree of fault evidenced by the government's action or inaction. *Brown v. Bryan County*, 219 F.3d 450, 459 (5th Cir. 2000).

19. "To prevail on a failure to train theory a plaintiff must demonstrate: (1) that the [government's] training procedures were inadequate, (2) that the [government] was deliberately indifferent in adopting its training policy and (3) that the inadequate training policy directly caused the violations in question." *Zarnow v.*

City of Wichita Falls, 614 F.3d 161, 170 (5th Cir. 2010) (internal quotations omitted). For evaluation of such a claim, "the focus must be on the adequacy of the training program in relation to the tasks the particular officers must perform." *Snyder*, 142 F.3d at 798. "[F]or liability to attach based on an 'inadequate training' claim, a plaintiff must allege **with specificity** how a particular training program is deficient." *Roberts*, 397 F.3d at 293 (emphasis added).[1] "In this inquiry, mere proof that the injury could have been prevented if the officer had received better or additional training cannot, without more, support liability." *Id*.

20. The Supreme Court has specifically held that "[a government's] culpability for a deprivation of rights is **at its most tenuous** where (as here) a claim turns on a **failure to train**." *Id*. (emphasis added). [T]he 'policy' that [Plaintiff] seeks to rely upon is far more nebulous, and a good deal further removed from the constitutional violation in *Monell* [*v. New York City Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978)]." *Oklahoma City v. Tuttle*, 471 U.S. 808, 822, 105 S. Ct. 2427, 2436 (1985). The basis for liability against a City under such circumstances is dependent upon the degree of fault evidenced by the governmental entity's action or inaction. *Brown v, Bryan County*, 219 F.3d 450, 459 (5th Cir. 2000).

21. Prominently, the Court can take judicial notice of the statutes of the State of

[1] Anything less would violate *Iqbal's* prohibition of conclusory pleadings and mere assertions of factually unsupported legal theories.

Texas which establish that the State of Texas has delegated the Texas Commission on Law Enforcement (TCOLE) as the agency in Texas responsible for establishing law enforcement officer licensing and training standards and providing officer training to all police officers that is sufficient to prepare them to fulfill the duties entrusted to them. The State of Texas has designated TCOLE as the agency in Texas responsible for establishing a statewide comprehensive education and training program for law enforcement officers so all officers in Texas are trained, through curriculum approved by TCOLE. Each officer employed by the City must have a peace officer license through TCOLE, and have been trained in accordance with the requirements of the State of Texas. Texas statutes show that mandated TCOLE curriculum requires all law enforcement recruits to receive training regarding search and arrest procedure, and the Constitutional limitations thereon.

22. The State of Texas assures that all peace officers receive this training by charging TCOLE by statutory mandate to provide such training. Specifically, section 1701.251 of the Texas Occupations Code provides that TCOLE "shall establish and maintain training programs for officers." Section 1701.253 further requires that TCOLE "shall establish a statewide comprehensive education and training program on civil rights…" and which "covers the laws of [the state of Texas] and of the United States pertaining to peace officers" for all licensed law enforcement officers in Texas. Section 1701.352(d) additionally requires that,

within 24 months of appointment as a supervisor, all law enforcement officer supervisors receive training regarding supervising police officers.

23. Furthermore, sections 1701.307 and 1701.351 provide that, in order to obtain and maintain, a peace officer license in Texas, an officer must satisfactorily meet all TCOLE training and licensing standards. These TCOLE standards have generally been determined by federal courts to meet federal constitutional requirements regarding police officer training, hiring and supervision. No federal court has held that any TCOLE training standard failed to meet constitutional requirements. *See Baker v. Putnal*, 75 F.3d 190, 199-200 (5th Cir. 1996); *Benavides v. County of Wilson*, 955 F.2d 968, 973 (5th Cir. 1992). Therefore, the City's policymaker can hardly be said to be deliberately indifferent by relying on the sufficiency of these statewide statutory standards. *See id.*

5. No factual allegation shows the City was deliberately indifferent to the need for a constitutionally adequate officer supervision program.

24. Plaintiff does not allege facts which show that the City's policymaker was deliberately indifferent to the need for a constitutionally adequate officer supervision program. In order to support such a claim, Plaintiff must allege facts which show that the City systematically failed to supervise its officers a causal connection existed between the alleged failure to supervise officers and deprivation of Plaintiff's constitutionally protected rights, and also that such failure to

supervise was done by the City through deliberate indifference. *Southard v. Texas Board of Criminal Justice*, 114 F.3d 539, 551 (5th Cir. 1997); *Baker v. Putnal*, 75 F.3d 190, 199 (5th Cir. 1996).

25. Plaintiff alleges nothing more than the **bald conclusion** that officers were not properly supervised but such a conclusion does not suffice under Rule 12 because it is not supported by any factual allegation whatsoever and because the meager facts asserted do not show a plausible claim. *See Dartmouth Review*, 889 F.2d at 16; *Spiller*, 130 F.3d at 167. Accordingly, Plaintiff fails to allege facts which show a plausible claim for relief against the City based upon its officer supervision program.

B. No factual allegation plausibly shows the City's policymaker caused a deprivation of Plaintiff's rights.

26. There is no factual allegation which shows that the City's policymaker's conduct was a moving force that caused Plaintiff to suffer an injury. *See James v. Harris County*, 577 F.3d 612, 618-619 (5th Cir. 2009). Even if an unconstitutional City policy existed, liability inures to a City under § 1983 only when the execution of that City's policy actually *caused* a constitutional violation, *Piotrowski*, 237 F.3d at 581.There is no such allegation in this case. "[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. Plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the moving force behind the injury alleged." *Brown*, 520 U.S. at

404, 117 S. Ct. at 1388.

27. To hold otherwise would be a clear departure from controlling precedent regarding municipal liability in a § 1983 claim; therefore, to subject a governmental entity to liability under § 1983, "[i]n addition to culpability, there must be a direct causal link between the municipal policy and the constitutional deprivation." *Piotrowski,* 237 F.3d at 579. It is crucial that the requirements of governmental culpability and governmental causation "not be diluted, for '[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability." *Piotrowski,* 237 F.3d at 579 (quoting *Snyder,* 142 F.3d at 798).

28. Plaintiff's factual allegations do not even suggest an officer's alleged unlawful action was caused by any City policy. Therefore, Plaintiff's claims against the City should be dismissed for this reason as well, in addition to the several other reasons identified in this motion.

V. The Texas Constitution provides no private right of action for damages and does not define duty for a cause of action.

29. "[T]ort damages are not recoverable for violations of the Texas Constitution." *Daniels v. City of Arlington,* 246 F.3d 500, 507 (5th Cir. 2001). "[T]here is no Texas law equivalent to § 1983, and the Texas Constitution does not create an implied right of action for money damages." *Carter v. Diamond URS Huntsville, LLC,* 2015 U.S. Dist. LEXIS 74968 *39 (S.D. Tex. June 10, 2015)

(citing *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 146-50 (Tex. 1995)). Therefore, the Texas Constitution provides no basis for Plaintiff's claims.

VI. Officer Obregon is immune from claims brought under Texas law.

A. Officer Obregon is a governmental employee who is entitled to immunity under Texas law.

30. Texas law does not permit Plaintiff's state law claims against Officer Obregon so those claims must immediately be dismissed by in light of Texas Civil Practice & Remedies Code Section 101.106(f). This election of remedies statute supplies individual immunity to governmental employees. *See Neuman v. Obersteller*, 960 S.W.2d 621, 623 (Tex. 1997).

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

Franka v. Velasquez, 332 S.W.3d 367, 370 (Tex. 2011).

31. "The [Texas] Tort Claims Act's election-of-remedies provision 'favors the expedient dismissal of [civil claims asserted against] governmental employees when suit should have been brought against the government." *City of Dallas v. Groden*, 2016 WL 1367380 (Tex. App.—Dallas, 2016, pet. filed) (quoting *Texas*

Adjutant General's Office v. Ngakoue, 408 S.W.3d 350, 355 (Tex. 2013)).

32. Officer Obregon is an employee {Docket No. 1, ¶ 4, 9, 12} of the City of Port Lavaca, Texas, a governmental entity of the State of Texas,[2] on the date of the occurrences which form the basis of this lawsuit. {Doc. No. 15, ¶¶ 2, 15, 51, 52, 67, 70, 71}. Plaintiff sued Officer Obregon for his conduct as a police officer. Officer Obregon is, therefore, entitled to statutory immunity by filing a motion to dismiss. *See Singleton v. Casteel*, 267 S.W.3d 547, 549-50 (Tex.App.—Houston [14th Dist.] 2008, pet. denied).

B. Plaintiff's claims against Officer Obregon are based on conduct within the general scope of duties of his police office or employment.

33. A police officer acts within the general scope of duties of his police office or employment when his conduct is within the scope of duties generally assigned to him by his governmental employer. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 658 (Tex. 1994).[3] "The TTCA defines the term 'scope of employment' as 'the performance for a governmental unit of the **duties** of an employee's **office or employment** and **includes** being in or about the **performance of a task lawfully assigned to an employee by competent authority**.'" *Moore v. Barker*, 2017 Tex.

---

[2] *See* § 101.001(3)(B), TEX. CIV. PRAC. & REM. CODE; *Harold v. City of Port Lavaca*, 2000 TEX. APP. LEXIS 4820 *3-6 (Tex. App. – Corpus Christi, July 20, 2000, no pet.).

[3] Official immunity exists in Texas common law and in statutory form through TEX. CIV. PRAC. & REM. CODE §101.106. Both forms of include a requirement that the officer's conduct be performed within the general scope of police duties. Officer Obregon here asserted immunity available through the statute.

App. LEXIS 8623 *8 (Tex. App.—Houston [14th Dist.] September 12, 2017, no pet.) (emphasis added) (quoting TEX. CIV. PRAC. & REM. CODE §101.001(5)). "**[E]ngaging in an arrest is conduct that is generally within officer's scope of employment; it is not an independent course of conduct that fails to serve any purpose of the employer**." *Fink v. Anderson*, 477 S.W.3d 460, 467 (Tex.App.—Houston [1st Dist.] 2015, no pet.) (emphasis added). In an arrest setting, the relevant issue is "whether the police officers were performing a discretionary function (when they allegedly acted wrongfully), **not on whether they had discretion to do an allegedly wrongful act while discharging that function**." *Id*. at 470 (emphasis added). A police officer acts within the scope of governmental duties as long as his conduct is related to the performance of his job, even if acts which form the basis of a lawsuit are intentional torts or are negligently or wrongly performed. *Id*. at 468-469; *see also Moore*, at **8-12.

C. Plaintiff could, and should, have brought his state law claims under the Texas Tort Claims Act against the City of Port Lavaca, Texas, Officer Obregon's governmental employer.

34. Plaintiff could, and should, have brought his state law claims under the Texas Tort Claims Act against the City of Port Lavaca, Texas. *See* TEX. CIV. PRAC. & REM. CODE §101.106(f); *City of Watauga v. Gordon*, 434 S.W.3d 586, 587-594 (Tex. 2014); *Alexander*, 435 S.W.3d at 792. Plaintiff's claims are torts that must have been brought, if at all, under the Texas Tort Claims Act. *See Franka*, 332

S.W.3d at 381 n. 63; *Donohue v. Dominguez*, 486 S.W.3d 50, 54-55 (Tex. App.—San Antonio 2016, pet. for review denied).

35. "In *Franka*, [this Court] held that, barring an independent statutory waiver of immunity, tort claims against the government are brought 'under this chapter [the TTCA]' for subsection (f) purposes even when the TTCA does not waive immunity for those claims." *Alexander v. Walker*, 435 S.W.3d 789, 792 (Tex. 2014) (Per Curiam) (quoting *Franka*, 332 S.W.3d at 379-380) (quoting TEX. CIV. PRAC. & REM. CODE §101.106(f)). Plaintiff's "common-law tort claims against the officer[] therefore could have been brought under the TTCA against the government." *See Alexander*, 435 S.W.3d at 792. Accordingly, Officer Obregon is immune from the claims brought under Texas law.

CONCLUSION AND PRAYER

36. For these reasons, the Court should dismiss, with prejudice, the claims brought under 42 U.S.C. § 1985, 42 U.S.C. § 1985, malicious prosecution under 42 U.S.C. § 1983, all claims brought under Texas law, and all claims asserted against the City of Port Lavaca, Texas.

Respectfully submitted,

/s/ Norman Ray Giles
WILLIAM S. HELFAND
Attorney-in-Charge
SBOT: 09388250
NORMAN RAY GILES
SBOT: 24014084

OF COUNSEL:

LEWIS BRISBOIS BISGAARD & SMITH, LLP
24 Greenway Plaza, Suite 1400
Houston, Texas 77046
(713) 659-6767
(713) 759-6830 (Fax)

ATTORNEYS FOR DEFENDANTS
City of Port Lavaca, Texas
Officer Juan Obregon

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record in accordance with the District's ECF service rules on this 11th day of September, 2019.

Andre D. Davis
3003 South Loop West, Suite 108
Houston, Texas 77054
andre@attorneyandreevans.com

/s/ Norman Ray Giles